

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND
INJURY FUND,**

APPELLANT

vs.

JAMES WITTE,

RESPONDENT

DOCKET NUMBER WD74644

DATE: SEPTEMBER 4, 2012

Appeal from:

The Labor and Industrial Relations Commission

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

Attorneys:

Rochelle L. Reeves, for Appellant

Douglas B. Salsbury, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

**TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND
INJURY FUND, APPELLANT**

v.

JAMES WITTE, RESPONDENT

WD74644

Labor and Industrial Relations

Before Division Two Judges: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

On April 18, 2007, Claimant James Witte slipped and fell while cleaning a walk-in freezer at Sho-Me Livestock Cooperative, Inc. where he worked as a laborer. Claimant suffered a broken right leg and hip, which required surgery. Claimant now has a titanium pin and rod in his right leg and hip that causes him discomfort and interferes with his ability to bend, stoop and lift. After settling his workers' compensation claim against his employer, Claimant sought permanent partial disability ("PPD") benefits from the Second Injury Fund ("the Fund").

After a hearing on the matter, the administrative law judge found that Claimant was not entitled to PPD benefits from the Fund because his preexisting PPDs did not meet the requisite statutory thresholds set forth in § 287.220.1 to establish Fund liability. Claimant then appealed the ALJ's denial of his claim for PPD benefits to the Labor and Industrial Relations Commission ("the Commission"). The Commission reversed the ALJ's findings and awarded Claimant \$8,478.55 in PPD benefits on the basis that Claimant suffered from the following PPDs: 10% of the body as a whole referable to diabetes, 10% of the body as a whole referable to Claimant's gastrointestinal condition, 10% of the body as a whole referable to Claimant's psychiatric problems, 10% of the right leg at the 207-week level referable to Claimant's childhood right leg injury, and 5% of the body as a whole referable to the lumbar spine.

In reaching its award, the Commission determined that ALJ had denied Claimant PPD benefits on the basis that each of his preexisting PPDs, considered in isolation, must meet the minimum thresholds set out § 287.220.1 – 50 weeks of compensation for an injury to the body as a whole or 15% PPD for an injury to a major extremity only. The Commission concluded there was no support for such a proposition in Missouri's Workers' Compensation Law and, instead, found that the ALJ should have calculated Claimant's "overall preexisting permanent partial disability." In calculating Claimant's "overall" preexisting PPD, the Commission converted each of Claimant's preexisting PPDs into weeks of compensation, which totaled 160.7 weeks. The Commission then found that Claimant's "overall" preexisting PPD of 160.7 weeks easily satisfied the 50-week minimum threshold set forth in § 287.220.1.

The Fund now appeals from the Commission's award. The Fund asserts that, in reaching its award, the Commission erroneously interpreted the minimum thresholds set forth in § 287.220.1.

REVERSED

Division Two holds:

(1) The Commission erred as a matter of law when it concluded that each of Claimant's preexisting permanent partial disabilities, considered in isolation, need not satisfy the minimum thresholds set forth in § 287.220.1. Thus, the Commission erroneously awarded Claimant \$8,478.55 in permanent partial disability benefits from the Fund because none of Claimant's body as a whole injuries satisfies the fifty weeks of compensation minimum threshold required to trigger Fund liability for body as a whole injuries; nor does Claimant's injury to his right leg at the 207-week level satisfy the minimum threshold of fifteen percent permanent partial disability required to trigger Fund liability for injuries to major extremities.

DISSENTING OPINION BY JUDGE PFEIFFER:

The dissent concurs with the majority opinion's conclusion that the Commission erred in its § 287.220.1 minimum threshold calculation finding second injury fund ("Fund") liability when the Commission included "major extremity" weeks of preexisting disability in its "body as a whole" calculation of Claimant's preexisting permanent partial disability. However, the dissent would hold that sufficient competent and substantial evidence exists on the record to support the Commission's ultimate decision that the § 287.220.1 minimum threshold triggering Fund liability has been met. Even without including the 20.7 weeks of compensation that the Commission found due to Claimant's "major extremity" leg injury, the Commission found that the Claimant's other injuries or conditions of the "body as a whole" totaled 140 weeks of compensation, which is far more than the required fifty weeks necessary to trigger fund liability. The dissent would hold that the plain language of § 287.220.1 would allow for "stacking" of *either* "body as a whole" or "major extremity" injuries or conditions (although not both), if appropriate, in calculating the threshold amount of disability.

Opinion by Joseph M. Ellis, Judge

Date: September 4, 2012

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